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v.

ABDUL HALIM ABD SAMAT

COURT OF APPEAL, PUTRAJAYA

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RAUS SHARIF PCA

ABDUL MALIK ISHAK JCA

UMI KALTHUM MAJID JCA

[CRIMINAL APPEAL NO: T-06B(S)-65-10-2013]

12 FEBRUARY 2014

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CRIMINAL PROCEDURE: *Appeal - Appeal against sentence - Principles of sentencing - Whether appellate court should interfere in sentence imposed - Whether order of binding over appropriate*

CRIMINAL PROCEDURE: *Sentence - Binding over - Appeal against inadequacy of sentence - Whether binding over order adequate in view of gravity of offence - Whether gravity of offence outweighed mitigating factors - Whether custodial sentence warranted - Criminal Procedure Code, s. 294*

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This was an appeal by the prosecution on inadequacy of sentence meted out against the respondent ('the accused'). The brief facts of the case were that on 3 July 2011, the accused together with two other assailants at large, had approached and mercilessly attacked the victim with a sharp object ('the parang') causing injuries to the victim. The incident was witnessed by the victim's wife and mother-in-law. Consequently, the accused was charged under s. 326 of the Penal Code and pleaded guilty to the offence. Upon conviction, the Sessions Court directed the accused to be bound over under s. 294 of the Criminal Procedure Code ('CPC') for a period of three years and ordered to pay compensation of RM12,000 to the victim. This was later affirmed by the High Court where it was guided by the principle that an appellate court should not readily interfere with the sentence imposed by the trial court. Dissatisfied with the decision, the prosecution appealed to this court and contended that the sentence of binding over was manifestly inadequate, considering the gravity of offence committed and seriousness of injury inflicted on the victim. The issue that arose for consideration in this appeal was whether this was a fit case to bind over the accused under s. 294 of the CPC.

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A Held (allowing appeal; setting aside order of High Court)
Per Raus Sharif PCA delivering the judgment of the court:

- B** (1) The sentence imposed must reflect the gravity of the offence. When a judge imposes a sentence, he is making a statement whether the offence is serious or trivial. Thus, judges in meting out sentences must be very cautious and must weigh the balance between the gravity of the offence with the proposed sentence. (para 10)
- C** (2) This was not a fit and proper case to grant mercy upon the accused by making an order under s. 294 of the CPC as the offence committed was grave in nature that it outweighs the mitigating factors which had been advanced in the accused's favour. The fact that he was a civil servant should not sway the courts in showing leniency towards him. (para 12)
- D** (3) If the court were to accede to the request of the accused's counsel, the public will think that the court is putting the interest of criminals above the interest of the public. That cannot be right. This type of criminal conduct must be dealt with severely by the courts if it is to serve as a warning to other would be offenders. Furthermore, the element of public interest may be best served through imposition of a custodial sentence. (para 13)
- E**
- F** (4) Although the fact that an order under s. 294 of the CPC is punitive in nature, each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s. 294 of the CPC, binding over in all the circumstances of the case is expedient. Hence, the reliance on the case of *Nor Afizal Aziz* v. *PP* was misplaced. (para 14)
- G**
- H** (5) An order for the payment of compensation will not redeem the pain and agony endured by the victim and his family. Hence, a mere payment of RM12,000 as compensation will not be able to meet the ends of justice especially when the victim had rejected the offer resulting in the compensation sum being paid into court. (para 16)

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- (6) The binding over order imposed by the Sessions Court which was affirmed by the High Court was not reflective of the seriousness of the offence and the public abhorrence for this type of criminal conduct. Thus, over emphasis by the Sessions Court and the High Court on the interest of the accused and total disregard to public interest was a misdirection in law. (para 17)

[Sentencing accused to ten years' imprisonment; and compensation sum of RM12,000 paid into court to be reimbursed to the accused.]

Bahasa Malaysia Translation Of Headnotes

Ini adalah rayuan oleh pihak pendakwaan terhadap hukuman tidak memadai yang dijatuhkan ke atas responden ('tertuduh'). Fakta ringkas kes adalah bahawa pada 3 Julai 2011, tertuduh bersama-sama dengan dua penyerang yang masih bebas, telah menghampiri dan tanpa belas kasihan menyerang mangsa dengan menggunakan sebilah parang mengakibatkan kecederaan kepada mangsa. Kejadian ini disaksikan oleh isteri dan ibu mertua mangsa. Akibatnya, tertuduh telah didakwa di bawah s. 326 Kanun Keseksaan dan mengaku bersalah di atas kesalahan itu. Setelah disabitkan, Mahkamah Sesyen mengarahkan tertuduh berkelakuan baik di bawah Kanun Tatacara Jenayah ('KTJ') untuk tempoh tiga tahun dan diarahkan membayar pampasan sebanyak RM12,000 kepada mangsa. Ini kemudiannya telah disahkan oleh Mahkamah Tinggi berpandukan kepada prinsip bahawa mahkamah rayuan tidak akan, dengan mudah, campur tangan dalam hukuman yang dijatuhkan oleh mahkamah bicara. Tidak berpuas hati dengan keputusan itu, pihak pendakwaan merayu kepada mahkamah ini dan menghujahkan bahawa hukuman untuk berkelakuan baik adalah terlalu ringan berbanding keseriusan kesalahan yang dilakukan dan keseriusan kecederaan yang dialami mangsa. Isu yang timbul untuk pertimbangan dalam rayuan ini adalah sama ada ia merupakan kes yang wajar untuk tertuduh diarahkan berkelakuan baik di bawah s. 294 KTJ.

Diputuskan (membenarkan rayuan; mengenyepikan perintah Mahkamah Tinggi)

Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

- (1) Hukuman yang dijatuhkan mestilah mencerminkan keseriusan kesalahan. Apabila hakim menjatuhkan hukuman, beliau membuat pernyataan sama ada kesalahan tersebut adalah

- A serius atau remeh. Oleh itu, hakim-hakim yang menjatuhkan hukuman mesti berhati-hati dan mestilah mengimbangkan keseriusan kesalahan dengan hukuman yang dicadangkan.
- B (2) Ini bukanlah satu kes yang wajar dan sesuai untuk menunjukkan belas kasihan kepada tertuduh dengan mengenakan suatu perintah di bawah s. 294 KTJ kerana kesalahan yang dilakukan bersifat sangat serius iaitu melebihi faktor-faktor mitigasi yang dikemukakan yang memihak kepada pihak tertuduh. Hakikat bahawa dia adalah penjawat awam tidak seharusnya mempengaruhi mahkamah untuk memberikan peringanan kepadanya.
- C (3) Sekiranya mahkamah melayan permintaan peguam tertuduh, orang awam akan befikir bahawa mahkamah meletakkan kepentingan penjenayah mengatasi kepentingan awam. Ini adalah tidak betul. Jenis perlakuan jenayah ini mestilah ditangani dengan keras oleh mahkamah jika fungsinya adalah sebagai amaran kepada bakal pesalah-pesalah. Tambahan pula, elemen kepentingan awam boleh terlaksana dengan sebaik-baiknya melalui pengenaan hukuman penjara.
- D (4) Walaupun pada hakikatnya perintah di bawah s. 294 KTJ bersifat punitif, sesuatu kes mesti dipertimbangkan mengikut meritnya yang tersendiri dan perlu diteliti untuk menentukan sama ada, mengambil kira mana-mana perkara yang dinyatakan dalam s. 294 KTJ, berkelakuan baik dalam hal keadaan kes adalah wajar. Oleh itu, kebergantungan ke atas kes *Nor Afizal Azizan v. PP* adalah salah.
- E (5) Suatu perintah pembayaran pampasan tidak akan menebus kesakitan dan kesedihan yang ditanggung oleh mangsa dan keluarganya. Oleh itu, bayaran RM12,000 semata-mata sebagai pampasan tidak akan menjamin keadilan terutamanya apabila mangsa menolak tawaran menyebabkan jumlah pampasan dibayar kepada mahkamah.
- F (6) Perintah berkelakuan baik yang dikenakan oleh Mahkamah Sesyen yang disahkan oleh Mahkamah Tinggi tidak mencerminkan betapa seriusnya kesalahan dan kebencian orang awam terhadap jenis perlakuan jenayah itu. Oleh itu, penekanan yang lebih oleh Mahkamah Sesyen dan Mahkamah
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Tinggi terhadap kepentingan tertuduh dan kegagalan mengambil kira kepentingan awam merupakan satu salah arahan undang-undang. A

[Menghukum tertuduh kepada sepuluh tahun penjara; dan jumlah pampasan RM12,000 dibayar kepada mahkamah dibayar balik kepada tertuduh.] B

Case(s) referred to:

Lim Kim Poh v. PP [2000] 8 CLJ 328 HC (*refd*)

Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA (*dist*)

Simmathurai Subramaniam v. PP [2011] 5 CLJ 56 CA (*refd*) C

PP v. Lee Meow Sim Jenny [1993] 3 SLR 885 (*refd*)

PP v. Lim Guan Hock, Public Prosecutor v. Boo Swee Kim [1949] MLJ 231 (*refd*)

R v. Inwood (Roland Joseph) [1974] 60 Cr App R 70 (*refd*)

Legislation referred to: D

Criminal Procedure Code, s. 294

Penal Code, ss. 34, 326

For the appellant - Mohd Fairuz Johari; DPP

For the respondent - Saha Deva A Arunasalam; M/s Saha & Assocs E

[Appeal from High Court, Kuala Terengganu; Criminal Appeal No: 42H(A)-01-11-2012]

Reported by Shah Saharudin

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JUDGMENT

Raus Sharif PCA:

[1] This is an appeal by the Public Prosecutor on inadequacy of sentence meted out against the respondent ('accused'). The accused was charged with two others still at large before the Kuala Terengganu Sessions Court for an offence under s. 326 of the Penal Code read together with s. 34 of the same Code. The charge reads as follows: G

Bahawa kamu bersama-sama 2 orang yang masih bebas, pada 3.7.2011 jam lebih kurang 11.30 malam, bertempat di tempat letak kereta di kawasan rumah beralamat 306 Kampung Cegar Batang, Jalan Pasir Akar, dalam Daerah Besut, di dalam Negeri Terengganu Darul Iman, telah menyebabkan cedera parah keatas I

- A Mohd Khafilullah bin Mat Ayub, No KP 760608-03-5263 dengan menggunakan sebilah parang. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 326 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.
- B [2] The accused pleaded guilty. On 23 October 2012 the Sessions Court directed him to be bound over under s. 294 of the Criminal Procedure Code ('CPC') for a period of three years with one surety in the sum of RM5,000. The Sessions Court also ordered the accused to pay compensation in the sum of
- C RM12,000 to Mohd Khafilullah bin Mat Ayub ('victim').
- [3] The Public Prosecutor appealed to the High Court against the decision of the Sessions Court. The learned High Court Judge dismissed the Public Prosecutor's appeal and affirmed the decision
- D of the Sessions Court.
- [4] An appeal was further preferred by the Public Prosecutor to the Court of Appeal. We heard the appeal on 9 January 2014 and allowed the Public Prosecutor's appeal. We set aside the orders
- E of the courts below and instead imposed a custodial sentence of imprisonment for ten years. We ordered that the sentence of imprisonment to run from the date of our order ie, 9 January 2014. We also ordered the compensation sum of RM12,000 which was paid into court to be refunded to the accused.
- F **Facts**
- [5] To state briefly, the victim in this case was attacked by the accused and two other assailants at large with a sharp object ("parang") at his home in Kg Cegar Batang, Jalan Pasir Akar,
- G Terengganu. On that fateful day the accused and two other assailants went to the victim's house in a car around 11.30pm. They drove into the victim's house compound, got down from their car, approached the victim and started attacking him mercilessly with the parang. The ordeal which lasted for about five
- H minutes was witnessed by the victim's wife and his mother-in-law. As a result of the attack the victim sustained the following injuries as reported in the medical report (P3):
- I 5.1. a 10cm laceration wound over the right temporal area of the head;
- 5.2. a 5cm x 1cm laceration wound over the right ear; and

5.3. multiple lacerations over the right forearm and hand ranging from 2cm to 10cm. The most proximal wound at the right forearm was deep cutting the muscles and the ulna bone causing an open fracture. A

[6] Before us, learned Deputy Public Prosecutor ('DPP') submitted that the sentence of binding over under s. 294 of the CPC as ordered by the learned Sessions Court Judge and later affirmed by the learned High Court Judge was manifestly inadequate. To this end the learned DPP pointed out that the courts below erred in fact and in law in failing to consider the gravity of the offence committed and the seriousness of the injury that was inflicted on the victim. In short, it was impressed upon us that the sentence of binding over under s. 294 of the CPC was unsustainable on the given facts and circumstances of this case. B C D

[7] Learned counsel acting for the accused submitted that this court should not readily interfere with the sentence imposed by the courts below. According to him the sentence meted out was reformatory and rehabilitative in nature after taking into consideration all the factors. He further submitted that the sentence of binding over under s. 294 of the CPC does not exonerate the accused from the offence he had committed. The case of *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370 was cited in support of his proposition. E F

Findings

[8] The appeal before us centres on the inadequacy of the sentence imposed against the accused by the Sessions Court and later affirmed by the High Court. As stated earlier the main complaint of the learned DPP was that the sentence of binding over under s. 294 of the CPC was manifestly inadequate. Thus, the point to be considered in this instant appeal is whether this is a fit case to bind over the accused under s. 294 of the CPC. The learned Sessions Court Judge in deciding as she did took into consideration the following factors: G H

8.1. that the accused was 45 years old at the time of the commission of the offence and he was a first offender;

8.2. that the accused was a civil servant; I

- A 8.3. that the accused was suffering from heart ailment with high blood pressure as well as diabetes; and
- 8.4. that the victim and the accused are related and they were involved in a long standing family feud and there were
- B some sort of previous enmity between the accused, the victim and the victim's family.

[9] The learned High Court Judge in affirming the sentence imposed by the learned Sessions Court Judge gave the following reasons:

- C Saya telah mendapati bahawa kesemua faktor yang diambil kira oleh HMS merupakan faktor yang material, yang perlu ditimbang oleh mana-mana mahkamah sebelum menjatuhkan suatu hukuman. Saya seterusnya mendapati bahawa faktor-faktor tersebut terjumlah kepada faktor peringanan sebagaimana diperuntukkan di bawah s. 294 KTJ dan ditekankan dalam kes *Yeong Yin Choy*. Walaupun, kesemua faktor berikut lebih memihak kepada responden, namun saya berpendapat HMS juga turut mengambikira prinsip keadilan yakni menimbang keadaan pengadu yang telah cedera dan telah memerintahkan responden membayar pampasan sebanyak
- D RM12,000 kepada pengadu. Selain itu juga, saya bersetuju dengan alasan HMS bahawa faktor kepentingan awam bukan hanya akan terjaga seandainya Responden dikenakan hukuman penjara bahkan juga dalam keadaan di mana Responden diletakkan di bawah bon, di mana Responden harus mematuhi syarat-syarat tertentu dan berkelakuan baik sepanjang tempoh bon. Tiga (3) tahun adalah
- E lama dan cukup untuk mencegah Responden dari mengulangi kesalahan yang sama atau melakukan kesalahan selainnya dan ini secara tidak langsung mengimbangi kadar jenayah daripada terus berleluasa seiring dengan kepentingan awam.
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- G **[10]** It appears that the learned High Court Judge stood guided by the principle that an appellate court should not readily interfere with the sentence imposed by the trial court. Whilst we agree that it is a guiding principle, we must not lose sight of the fact that the sentence imposed must also reflect the gravity of the offence.
- H When a judge imposes a sentence, he is making a statement whether the offence is serious or trivial. It is in this context that judges in meting out sentences must be very cautious and must weigh the balance between the gravity of the offence with the proposed sentence. The sentence imposed must always reflect
- I public interest after taking into account the mitigation advanced by the accused. (See *Sinnathurai Subramaniam v. PP* [2011] 5 CLJ 56).

[11] As judges, we must always remind ourselves that the fundamental role of a judge in a criminal justice system is to ensure that the measure of punishment should be proportionate to the offence committed. In the instant case, the undisputed facts clearly showed that the accused had come to the victim's house with two other persons on that fateful day armed with a parang to attack the victim. There was no evidence as to the sudden *fracas* between the victim and the accused. There was also no evidence to show that the victim had used any weapon against the accused in defending himself. Thus, evaluating the facts as a whole, there is only one conclusion that could be arrived at, ie, that the accused had acted excessively in attacking the victim repeatedly with a parang causing grievous injuries to the victim. The victim was helpless. His loved ones stood as witnesses to this whole incident.

[12] On those facts, we are of the view that this is not a fit and proper case to grant mercy upon the accused by making an order under s. 294 of the CPC. The offence that was committed by the accused is grave in nature that it outweighs the mitigating factors which have been advanced in his favour. The fact that the accused was a civil servant should not in our view sway the courts in showing leniency towards the accused. Thus, the conduct of the accused in all the circumstances of the case cannot be condoned and it warrants a deterrent sentence in order to maintain law and order and public confidence in the rule of law. A person who commits a serious offence must be punished severely.

[13] Learned counsel for the accused had urged this court to maintain the binding over order imposed by the courts below. With respect, if we were to accede to his request, the public will think that the court is putting the interest of criminals above the interest of the public. That cannot be right. As stated earlier this type of criminal conduct must be dealt with severely by the courts if it is to serve as a warning to other would be offenders. In our judgment, the element of public interest may be best served through the imposition of a custodial sentence given the gravity and other factors surrounding the wrongful act complained of. Surely, causing grievous hurt to a defenceless fellow human being, as in this case, attracts severe punishment under the law.

A [14] In his submissions, learned counsel placed great reliance on
the case of *Nor Afizal Azizan v. PP (supra)* to say that s. 294 of
the CPC is punitive in effect and amounts to a form of punishment
being inflicted on the offender. We find that learned counsel's
B reliance on the case of *Nor Afizal Azizan v. PP (supra)* is
misplaced. We say this because although we cannot deny the fact
that an order under s. 294 of the CPC is in fact punitive in nature
we must not lose sight of the fact that each individual case must
C be considered on its own merits and must be examined with a
view to ascertaining whether, having regard to any of the matters
mentioned in s. 294 of the CPC, binding over in all the
D circumstances of the case is expedient. (See *Public Prosecutor v. Lim Guan Hock*, *Public Prosecutor v. Boo Swee Kim* [1949] MLJ 231; and *Lim Kim Poh v. PP* [2000] 8 CLJ 328; [2000] 3 MLJ 411). It must be recognised that no two cases are alike, and that the facts must necessarily vary from case to case. At the end of the day, each case has to be decided on its own merits.

[15] Another point which merits consideration is whether the
order given by the learned Sessions Court Judge to compensate
E the victim was appropriate in the circumstances. The learned DPP
argued that an order of compensation does not amount to a
sentence being passed and neither is it suitable considering the
circumstances of this case. The learned DPP espoused his
contention by referring to the cases of *PP v. Lee Meow Sim Jenny*
F [1993] 3 SLR 885; and *R v. Inwood (Roland Joseph)* [1974] 60 Cr
App R 70. This seems to be a preferable view and we have no
reason to disagree with the learned DPP on this point. We are of
the view that the power of the court to award compensation is
not ancillary to other sentences but it is in addition thereto. It is
G a measure of responding appropriately to crime as well as to
reconciling the victim with the offender.

[16] Although an order for payment of compensation to a victim
is indeed a constructive approach to a crime as provided under
our criminal jurisprudence, the court must always evaluate to see
H whether based on the facts and circumstances surrounding the
case, such an order is appropriate. In our judgment, we find that
an order for the payment of compensation as was done in this
case will not redeem the pain and agony endured by the victim
and his family. A mere payment of RM12,000 as compensation in
I our view will not be able to meet the ends of justice. This is
especially so when the victim has rejected the offer resulting in the
compensation sum of RM12,000 being paid into court.

[17] To reiterate our views aforesaid, we would like to emphasise here that the offence committed by the accused was not trivial and there were no extenuating circumstances in the commission of this offence for the accused to escape custodial sentence. In our view the binding over order imposed by the learned Sessions Court Judge which was later affirmed by the High Court is not reflective of the seriousness of the offence and the public abhorrence for this type of criminal conduct. Over emphasis by the learned Sessions Court Judge and later the learned High Court Judge on the interest of the accused and total disregard to public interest is a misdirection in law which merits interference by this court.

[18] Thus, having regard to the facts, the circumstances and giving public interest the weight it deserves we allowed the learned DPP's appeal. The binding over under s. 294 of the CPC and order for payment of compensation of RM12,000 as ordered by the learned Sessions Court Judge and later affirmed by the High Court was therefore set aside. We substituted it with the sentence of ten years imprisonment to take effect from the date of our order ie, 9 January 2014. We also ordered that the compensation paid into court is to be reimbursed to the accused forthwith.

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